Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1132

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado Corporation,

Appellant,

vs.

THE COMMISSIONER OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; THE ADMINISTRATOR OF THE LABOR STANDARDS DIVISION OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF MONTANA; RAE S. BAUER; COMMUNICATIONS WORKERS OF AMERICA, a Labor Union; and THE MONTANA HUMAN RIGHTS COMMISSION, an Agency of the State of Montana,

Appellees.

MOTION TO THE STATE OF MONTANA TO DISMISS OR AFFIRM

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

MIKE GREELY
Attorney General
State of Montana
State Capitol
Helena, Montana 59601

DENNY MOREEN
Assistant Attorney General
JAMES GARDNER, JR.
Special Assistant
Attorney General
Staff Attorney
Labor Standards Division
Montana Department of
Labor & Industry
35 South Last Chance Gulch
Helena, Montana 59601

Attorneys for Appellees

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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The Appellee, State of Montana, moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment of the Montana Supreme Court.

I. The question presented is so unsubstantial as not to warrant further argument.

The question, simplified, is: Has Montana's Maternity Leave Act been preempted by the Employee Retirement In-

come Security Act (ERISA)[1] and/or the National Labor Relations Act (NLRA)[2]?

The Montana Maternity Leave Act became effective July 1, 1975 and gives to working women in the state of Montana the right to receive disability benefits for maternity leave, if these women are otherwise covered by a disability benefits plan. §§ 39-7-303, 1-2-101, MCA. Rae S. Bauer, an employee of appellant (Mountain Bell) claimed maternity leave benefits for a period beginning in October 1975 and running into February 1976.

Effective October 31, 1978 (P. L. 95-555, 92 Stat. 2076) the Pregnancy Disability Act of 1978 amended section 701 (k) of the Civil Rights Act of 1964 (42 U. S. C. 2000e(k)) to read:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703 (h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

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1 Section 29 U. S. C. 1001, et seq.

2 Section 29 U. S. C. 141, et seq.

The effect of this amendment is to lay the issue to rest. Whether or not the Montana Act had been preempted by sundry federal legislation is a stale question. The effect of section 701(k) is to require employers, who provide disability benefits to their employees, to provide maternity leave benefits after October 1978. To argue that there is a preemption question for any period after the amendment's effective date is specious.

Mountain Bell would have the Court believe the questions presented are "[S]ignificant issues of federal/state relations in the areas of collective bargaining and the regulations of employee benefit and pension plans . . .". Juris. Stat. 11. Surely a significant issue to this Court is not one which has become moot to the nation generally. There is no substantial federal question. The appeal should be dismissed.

II. The decision of the Montana Supreme Court is correct and should be affirmed summarily.

The only question now presented is whether persons in Montana seeking benefits for maternity leave taken during the period of July 1, 1975 (the effective date of the Montana Maternity Leave Act) through October 31, 1978 (the effective date of the federal Pregnancy Disability Act) are entitled to those benefits.

The Montana Supreme Court and ten other appellate courts throughout the United States have ruled that neither ERISA nor NLRA preempts state maternity leave acts. *Gast v. State of Oregon,* 36 Ore. App. 441, 585 P. 2d 12 (1978); *Bucyrus-Erie Company v. Department of Industry, Labor & Human Relations,* 453 F. Supp. 75 (E. D.

Wis.), aff'd, 599 F. 2d 205 (7th Cir. 1979); *Lukus v. Westinghouse Electric Corporation,* No. GD 77-14803 (Ct. Common Pleas, Allegheny County, Pa., April 20, 1978), aff'd., No. 910 (Sup. Ct. Penn., Pittsburg Dist. Jan. 4, 1980); *Goodyear Tire & Rubber Co. v. Department of Industry, Labor & Human Relations,* 87 Wis. 2d 586, 273 N. W. 2d 786 (1978); *Brown Co. v. Department of Industry, Labor & Human Relations,* 48 L. W. 2210, 20 BNA FEP 961 (W. D. Wis., Aug. 28, 1979); *Westinghouse Electric Corp. v. State Human Rights Appeals Bd.,* 401 N. Y. S. 2d 597, 60 A. D. 2d 943 (1978), *cert. denied,* 47 L. W. 3464 (1979); *Illinois Bell Telephone Co. v. Fair Employment Practices Commission,* 68 Ill. App. 3d 829, 25 Ill. Dec. 328, 386 N. E. 2d 599 (1979); *Minnesota Minning & Mfg. Co. v. State,* — Minn. —, — N. W. 2d —, 49079 and 49137 (Aug. 10, 1979); *Franklin Mfg. Co. v. Iowa Civil Rights Comm.,* — Iowa —, 270 N. W. 2d 829 (1978); *Liberty Mutual Insurance Co. v. State Div. of Human Rights,* 402 N. Y. S. 2d 218, 61 A. D. 2d 822 (1978); *Mountain States Tel. & Tel. Co. v. Commissioner of Labor and Industry,* — Mont. —, — P. 2d —, 36 St. Rptr. 1844 (1979).

The only appellate court decision which has ruled that a state maternity leave act is preempted by federal law is *Pervel Industries, Inc. v. Connecticut Commission on Human Rights & Opportunities,* 603 F. 2d 214 (2d Cir., 1979). *Pervel* is currently before this Court, Docket No. 79-107.

The eleven appellate courts that have ruled that state acts are not preempted by federal law are in agreement that it was the intent of Congress to allow states the right to require disability benefits for maternity leave if disability benefits are otherwise available to employees.

Congress, by enacting the Pregnancy Disability Act, has affirmed this interpretation of its intent. By so acting, Congress declared its intent that denial of maternity leave benefits is a violation of the Civil Rights Act of 1964, 42 U. S. C. 1981, et seq. Under the concurrent jurisdiction provisions of the Civil Rights Act (42 U. S. C. 2000e-7), state maternity leave laws enacted pursuant to the spirit and aegis of the Civil Rights Act are not preempted by federal law.

Subsequent legislation declaring the intent of an earlier statute is entitled to great weight. *Erlenbaugh v. United States,* 409 U. S. 239 (1972).

CONCLUSION

Montana respectfully submits there is no substantial question and the appeal should be dismissed or the judgment affirmed.

Respectfully submitted,

MIKE GREELY
Attorney General
State of Montana
State Capitol
Helena, Montana 59601

By: DENNY MOREEN
Assistant Attorney General

JAMES GARDNER, JR.
Special Assistant Attorney General
Staff Attorney
Labor Standards Division
Montana Department of Labor & Industry
35 South Last Chance Gulch
Helena, Montana 59601

Attorneys for Appellees